Fighting Terror Ethically and Legally: The Case of Targeting Terrorists
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In the ongoing war on terror both the American and Israeli governments have resorted to a policy of 'targeting terrorists.' In essence, both governments authorize their military or intelligence services to kill specific 'terrorists' who they believe mortally threaten citizens and cannot otherwise be neutralized. President Bush calls this 'sudden justice' and the Israeli government 'targeted killing' but their critics speak of 'assassination,' 'liquidation' or 'extra-judicial killing.' Since September 11, 2001, America is reported to have killed at least forty-four people without warning or trial under the guidance of this policy, at least 18 of whom were civilians; the Israelis have killed at least 348, including 120 unintended targets. (Morgan 2006; B'tselem 2006)

The legitimacy of targeting terrorists is sharply contested today. The United Nations (UN), leading human rights organizations like Amnesty International (Amnesty), and many Regional Intergovernmental Organizations like the European Union (EU), as well as many individual states and scholars denounce it regularly as immoral, illegal and counter-productive. On the other hand, Israel has defiantly insisted that the policy is legal, moral and necessary. (UN 2004, 2001, Israeli Ministry of Foreign Affairs (IMFA) 2006) Several states, including Australia, have voiced support for Israel's 'right to defend itself against terrorism.' (UN 2004, 2001; IMFA 2003, 2004) The United States has adopted a more ambiguous position, opposing the practice for other countries (such as Israel) at least officially, and only unofficially acknowledging its own targeting practices but defending them as a special case. (BBC 2002) In both the academic and popular press an increasing number of arguments have been heard over the last five years seeking to justify and defend the targeting of terrorists. (e.g., Byman 2006, 2006b; Dershowitz 2006; Kasher and Yadlin 2005, 2005b)

In this article, I examine the current international political debate over targeting terrorists to assess whether it has a legitimate place in the new kind of war being fought against terrorists. I consider key arguments advanced on both sides concerning the practice's legality (Section II), morality (Section III) and effectiveness (Section IV), and conclude that while the advocates of the policy make a compelling case that it is justifiable in principle, its critics are right that some targetings have been illegal, immoral and/or counter-productive, but they fail in turn to make their case for a comprehensive ban. In short, the debate over targeting terrorists is characterized by the unilluminating confrontation of opposed half-truths, each able to score points off the other but neither able to fully consolidate its own position.

The concomitant of this frustrating debate is a state of legal and political ambiguity surrounding the targeting of terrorists that in many ways represents the worst of all worlds. On one hand, the governments most victimized by international terrorism are

harshly criticized for what is in principle a legitimate means of defending their citizens; on the other hand, some actually illegal and reprehensible targetings are swept up in their defiant defenses of the general policy and are effectively permitted to go unpunished, with unfortunate implications for the credibility of international law. It is urgent therefore to find a resolution to this impasse that restores the clear rule of law. Given the force of the cases presented on both sides of the issue, however, this resolution cannot take the form of simply choosing one side and rejecting the other. What is needed is a principled compromise that reflects the legitimate claims of advocates and critics alike. The article ends with a suggestion of what such a resolution might look like. (Section V).

I. Necessary Preliminaries

Two important and contentious issues need to be addressed before turning to the current arguments around targeting terrorists. The first is how to define terrorism. The conflicts surrounding this charged, pejorative term are of course legion. (Schmid and Jongman 2005: 5-6, 32-8; Luck 2004) For present purposes I will adopt the definition proposed in 2004 by the United Nations Secretary-General's High-Level Panel on Threats, Challenges and Change (SGHLP) as the basis for a much needed comprehensive convention on terrorism. Terrorism comprises, according to the panel,

> any action… intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population or to compel a government or an international organization to carry out or to abstain from any act. (SGHLP 2004: p. 51-2)

Any person or organization which authorizes or executes such actions is guilty of terrorism. The Panel goes on to insist that such acts "cannot be justified on any grounds." In this comprehensive condemnation, the panel echoed the UN General Assembly's Resolution 51/210 (1996) which 'Strongly condemns all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomsoever committed.' (United Nations General Assembly 1996; see also Security Council Resolutions 635,638 1368, 1373 and the 12 current UN conventions treating different aspects of terrorism)

While the proposed UN definition has won widespread support, it has not, it must be admitted, satisfied everyone. Ted Honderich, for example, argues for a much wider definition. For Honderich, 'political violence… is terrorism.' (Honderich 2002: 93) But this seems obviously wrong. A small war (Honderich's example), although doubtless both violent and political, is not necessarily terrorism on either side. The war to the recover the Falklands, for example, should not be categorized as terrorism alongside 9/11 whatever objections may be raised to it. To equate terrorism with all political violence is to stretch the word beyond recognition and to deny distinctions integral to our basic moral sense. It may of course be that this sense is wrong, but until that is shown it seems preferable to work with it.

On the other hand, some have argued for a much narrower definition of terrorism. Asa Kasher and Amos Yadlin in their recent writing on the Israeli targeting policy have proposed a definition of 'acts of terror' which begins 'an act, carried out by individuals or organizations, not on behalf of any state….' (Kasher and Yadlin 2005: 4) Given their interest in sharply distinguishing Israeli targetings from the attacks openly carried out by

Palestinian terrorist organizations (such as Hamas, Tanzim, and the al-Aqsa Martyrs Brigade) their restriction makes sense. But this narrow definition nonetheless seems problematic in several respects. Systematically excluding the actions of states does not, for example, seem consonant with the term's history, which has its roots in the Jacobin Terror, nor with its current usage, which frequently encompasses 'state terrorism.' Moreover, as Noam Chomsky and others have rightly pointed out, given the overwhelming power of states today, their terrorizing should be of special concern to us, and should not be insulated by semantic stipulation. (Chomsky 2001: 16-7; George 1991) Moreover, there are many terrorist organizations today which are 'sponsored' by, and act 'on behalf' of, states, including some, like Hezbullah, which Kasher and Yadlin would presumably want to characterize as terrorist in view of their actions.

In contrast to both of these alternatives, the proposed UN definition strikes a nice compromise, and therefore provides a solid basis for the current study. It focuses on a deplorable act rather than the agent who commits it (and so is equally applicable to states, individuals or groups). Moreover, it appropriately specifies the kind of deplorable act it signifies rather than trying to incorporate all forms of political violence together under a single heading: it describes acts of 'serious' violence perpetrated against a particular group (noncombatants). This definition is consonant with both the term's historical roots and current usage and clarifies the source of its distinctive pejorative force.

A second question which demands preliminary attention concerns whether there the United States and Israel employ a common policy of targeting terrorists, or whether the countries find themselves in distinct situations and deploy different strategies in their fights against terrorism. (Nolte 2004: 126-8; Gross 2004) There are, without doubt, some important differences of situation. America is widely acknowledged as the sole current superpower, and the ultimate guarantor of the contemporary world order. Israel is a relatively marginal state in terms of economy, geography, and population, and although its military strength is a significant regional factor, diplomatically it remains dangerously isolated on both the regional and international levels. In short, Israeli behavior is unlikely to transform international legal or moral norms.

The two countries' terrorist enemies also differ in important ways. America's main adversary, al-Qaeda, is not a national liberation organization, as many Palestinian organizations are, and certainly there are few in the West who sympathize with its aspirations as many do with the goal of an independent Palestinian state. There may also be differences between America's and Israel's culpability in their enemies' grievances, but that comparison is too complex to examine here. Suffice it to say, as the UN has repeatedly, that no cause, however just, warrants the use of terror.

There are also some notable differences in the two countries' targeting policies, although these seem of secondary importance. Israel targets terrorists openly and acts primarily through its military - the Israeli Defense Force (IDF) - with the approval of the Minister of Defense and Prime-Minister. The American government only acknowledges its actions unofficially, and allows the CIA more independence in pursuing a list of targets approved by the Executive Branch. Israel has also been far more prolific in its targetings than

America, and has consequently caused far more casualties, both among combatants and noncombatants.

However, the essential fact remains that international terrorist organizations have declared war on both countries and have succeeded in carrying out devastating attacks directed against their (noncombatant) citizens. Both states have responded, in part, by hunting and killing terrorists who they think threaten their people and who they claim they cannot otherwise stop. In these basic senses their situations and policies are similar. Moreover, by treating the targeting of terrorists by the United States and Israel together it is possible to examine a wide range of arguments for and against this type of policy, to assess their merit and to draw a general conclusion which may have resonance for other countries facing international threats.

II. Targeting Terrorists Under International Law

The most frequently cited argument for the illegality of targeting terrorists is that it violates an international prohibition on assassination. (Gross 2003: 351; Stein 2000: 14). Advocates of targeting, however, dispute the argument, claiming that the definition of assassination in international law is very narrow, and does not encompass the targeting of terrorists in times of either peace or war. (David 2003: 112-3; Statman 2004: 180) In this dispute, the advocates of targeting have the more persuasive legal case.

Leading studies of international law addressing assassination have concluded that the prohibition is weakly grounded in treaties, and limited in its scope. As Michael Schmitt notes in his seminal study, the only international treaty which specifically calls for criminalization of assassination in times of peace is the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons. (Schmitt 1992: 618) However, as he notes, the convention only prohibits '*political* assassination'. More specifically, it addresses only the assassination of internationally protected persons (senior officials of states and intergovernmental organizations) when visiting a signatory's territory, and even then it only calls for domestic laws criminalizing such violence. The targeting of terrorists, however, is not generally directed against internationally protected persons in the treaty's sense and is therefore not 'political assassination' as described in the Convention.

Furthermore, Schmitt emphasizes that states have a right to act in self-defense enshrined in Article 51 of the UN Charter (and reiterated, it may be noted, in Security Council Resolution 1368 (2001) with specific reference to terrorist attacks). Where citizens are demonstrably threatened with mortal harm, this right can be invoked. The right of 'self-defense' vitiates the characterization of action as 'political' under the convention. The degree of threat required to sustain the claim of self-defense is ill-defined, but situations where there has recently been an attack, or where an attack is imminent, are unambiguous. In-so-far as states can successfully appeal to this right of self-defense, they would not be criminalized under the laws called for in the Convention regardless of the political status of their target. However, it might be objected that the Convention is only concerned with peacetime conditions, whereas Israel and the United States see their

situation increasingly as one of armed conflict with terrorists. In situations of armed conflict humanitarian law has primary application.

What then is the status of assassination under humanitarian law? Schmitt observes that it is somewhat more clearly defined, but again the definition is narrow and does not generally apply to targeting terrorists. In humanitarian law two important international treaties touch on assassination (although not by name). Both of these treaties are acknowledged today as constituting customary law and therefore apply universally. First, Article 23(b) of the 1899 Hague II Convention asserts that 'it is especially forbidden to kill or wound treacherously individuals belonging to the hostile nation or army.' This provision is echoed in contemporary Army Manuals, sometimes with specific reference to assassination (e.g., U.S. Army Field Manual 27-10, article 31). Second, Article 37 of the First Additional Protocol of the Geneva Convention (1977) states that

> It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy.

The Protocol appears to specify the prohibited dimension of treachery in the Hague Convention. Two examples of perfidy would be attacking from under a white flag, or while in civilian guise. In-so-far as the targeting of terrorists does not require perfidy, it is not prohibited as a policy under humanitarian law. This is not, however, to say that no specific targetings have involved perfidy. Some have. A case in point is the failed IDF targeting of Khaled Mashal, the chief of Hamas's Political Bureau, in Amman on September 25th, 1997. Mossad agents in civilian attire managed to poison Mashal but were apprehended by Jordanian authorities while attempting to leave the country. Israeli Prime Minister Netanyahu was eventually compelled not only to supply the antidote to save Mashal's life, but also to release Hamas' spiritual leader Sheikh Ahmed Yassin (who had been sentenced to life imprisonment in an Israeli jail). (David 2002: 4-5) The episode proved excruciatingly embarrassing to the Israeli government not only because of its disastrous failure, but also because Israel's use of agents in civilian clothing to poison Mashal clearly violated the Hague/Geneva prohibition on the use of treachery/perfidy, rendering the attack an illegal assassination attempt.

The standard American-style of targeting can also be argued to come close to perfidy. For instance, the U.S. attacks on Qaed Al-Harethi and his five companions in Yemen on November 3, 2002 and on Haitham al-Yemeni and his companion in Pakistan on May 7, 2005 were conducted without warning by the CIA using unmarked Predator Drone aircrafts. Moreover, the United States has yet to take official responsibility for these attacks. An argument could therefore be made that these attacks were 'perfidious' in the sense of occurring in a wholly civilian context. What makes the argument falter, however, is that it is hard to show how the Americans deliberately 'invited confidence' in that context. Nonetheless, it would certainly have been preferable from a legal standpoint if the targets had been previously judicially designated as combatants and if the attacks had come from soldiers in uniform and had been openly acknowledged. The prohibition of 'perfidious' killing in humanitarian law is thus relevant to assessing the legitimacy of particular acts but does not preclude the targeting of terrorists in general.

Schmitt concludes that while certain forms of assassination are prohibited under international law, others are permitted. His example of permissible assassination is, appropriately enough,

> combating terrorism. Whether terrorism amounts to armed conflict [and therefore falls under humanitarian law] is disputable. If it does, then states can engage terrorists directly and individually. Even if it does not, states have a generally recognized right of self-defense under international law, acknowledged in the UN Charter. Thus, if the targeted individual engages in activity that would qualify him as a combatant during an armed conflict, attacking him is legal. (Schmitt 1992: 644)

Targeting terrorists does not then, at least in principle, fall under the international prohibition of assassination. That does not, however, establish that the policy is legal. It might still violate other elements of international law. A number of critics argue, for example, that it violates human rights law.

II.i. Does Targeting Terrorists Violate the Human Right to Life?

The United Nations Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions (Rapporteur) has argued in a number of reports and statements that the targeting of terrorists violates the 'right to life' guaranteed in Article 3 of the Universal Declaration of Human Rights and Article 6 of the International Covenant on Civil and Political Rights, and made 'non-derogable' in Article 2(4) of the latter. (UNCHR 2004: 15-6)

The Rapporteur brought this right to the attention of the American government in connection with its 2002 targeting operation in Yemen. In response, the Rapporteur reported,

> the United States pointed out that since Al-Qaida was waging war unlawfully against it, the situation constituted an armed conflict and thus "international humanitarian law is the applicable law." In its view, "allegations stemming from any military operations conducted during the course" of such armed conflict "do not fall within the mandate of the Special Rapporteur," or of the [Human Rights] Commission itself. (UNCHR 2004: 15)

The U.S. went on to argue that since under humanitarian law it is permissible to kill the enemy provided that the killing is not carried out perfidiously and does not violate the two core humanitarian principles of necessity and proportionality (i.e., that it was *necessary* to the successful prosecution of the war and that the force employed was *proportional* to the goal), its Yemen operation was fully justified.

The U.S. government's claim that its Yemen operation took place in a situation of armed conflict seems plausible. The U.S. has declared a global 'war on terror' and fought military campaigns in Afghanistan and Iraq. Al-Qaeda too has, in Bin Laden's words, 'declared Jihad on the American government.' (Lawrence 2005: 46 and 47, also 23-30, 41-2, 48, 52, 61, 69-70) Moreover, humanitarian law fully recognizes that armed conflict may erupt between a state and a non-state actor, such as a guerilla force. While some critics, like Amnesty International have questioned the propriety of declaring a global

warzone, the policy is again consistent with al-Qaeda attacks on American installations and forces around the world, and with widespread U.S. operations against terrorists.

In recent years the Israeli government has also defined its relationship with Palestinian terrorist organizations as one of armed conflict. As Michael Gross observes, while Israel initially defended its policy of 'targeted killing' as a justified form of law enforcement, the intensification of the conflict and the broadening of its policy have 'led Israeli officials to relinquish the claim to law enforcement and [to] argue instead that assassinations are an acceptable means of armed conflict.' (Gross 2003: 354; Amnesty 2001: 23) This understanding seems consistent with the Palestinian description of their (second) *intifada* as an 'armed uprising' against foreign occupation. The Americans and Israelis then are on strong ground to invoke the law of armed conflict, and to deny that the right to life applies to confrontations within it.

In response, the Rapporteur has argued that the American and Israeli governments are mistaken to believe that 'where humanitarian law is applicable, it operates to exclude human rights law.' On the contrary, the Rapporteur asserts that 'it is now well recognized that the protection offered by international human rights law and international humanitarian law are coextensive, and that both bodies of law apply simultaneously unless there is a conflict between them.' (UNCHR 2004: 17) The right to life therefore remains applicable and targeting remains a violation.

However, defenders of targeting can respond that that is exactly the point. Clearly there is a conflict between human rights and humanitarian law over whether combatants possess a right to life. Combatants are clearly human beings, but if they enjoyed a right to life then they could not legally try to kill one another in combat, as permitted in humanitarian law. So the Rapporteur's refinement fails to vindicate the right to life, for there *is* a conflict of law, and in situations of armed conflict humanitarian law prevails.

In order to salvage the argument, critics of targeting need to show that while terrorists may be found in war zones, they are not actually combatants but civilians (who retain a right to life). Of course, this involves the counter-intuitive claim that terrorists are not combatants in the 'war on terror,' at least whenever they are not actually committing acts of terror. That is not typically, however, how terrorists see themselves - they describe themselves as freedom fighters, guerillas, martyrs in a noble but assymetrical struggle. (Post et al. 2003: 175-83) As Tamar Meisels insists, 'they themselves… do not deny the military nature of their deeds; indeed, they take pride in it.' (Meisels 2005: 303)

Nonetheless, this is precisely the argument that the Rapporteur and others make. Yael Stein, for example, draws on the Article 51(3) of the First Additional Protocol to the Geneva Convention, which provides that 'Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.' She reads this to mean except when actually firing on enemy soldiers '… and as soon as they cease to do so, they regain protection…. They maintain their civilian status…. They cannot be hunted down and summarily executed.' (Stein 2003: 129) Amnesty similarly holds that

> Armed Palestinians who directly participate in hostilities - for example by shooting at Israeli soldiers or civilians - lose their protected status for the duration of the attack…. They are civilians…. Because they are not combatants, the fact that they participated in armed attack at an earlier point cannot justify targeting them for death later on. (Amnesty 2001: 29)

Here Stein and Amnesty offer an implausibly constrained view of what it means to 'take part in hostilities,' which appears to exclude, for example, all preparation and retreat from attack - even between repeated attacks. This reading flies in the face not only of both common sense and the rest of the Protocol (Article 43 defines combatants simply as 'all organized armed forces, groups and units' whether under the authority of 'a government or an authority not recognized by an adverse party'), but also of the characteristic views of terrorists themselves. Michael Schmitt offers a more plausible perspective on the same passage:

> assume that the group has committed terrorism against the state and is expected to do so again in the future. In this scenario… the various terrorist acts may be regarded as part of a continuous operation. This characterization is analogous to the battle/war distinction. Once war has commenced, the initiation of each battle is not evaluated separately…. The situation is one of self-defense…. A tactic of targeting individuals merits no deviation from this general rule. (Schmitt 1992: 649)

On this more plausible reading, terrorists are assumed to be engaged in an ongoing struggle and therefore remain legitimate targets. After all, as Steven David has put it, 'Clearly, Palestinians armed with automatic weapons and bombs intent on killing Israeli citizens are not civilians.' (David 2003: 139)

Still, as Kenneth Roth, the Director of Human Rights Watch, points out, there are also cases that do merit some deviation from terrorists' continuing combat status. He argues that terrorists may cease to be combatants if their membership in their terrorist organization is 'subsequently withdrawn.' (Roth 2004: 4-5) On this basis he sharply criticizes the U.S.'s grounds for targeting Al-Harethi in Yemen in 2002. He argues that 'Al-Harethi's mere participation in the 2000 attack on the Cole would not have made him a combatant in 2002, since he could have subsequently withdrawn from al Qaeda.' (Roth 2004: 4-5) At very least, the U.S. should have offered some evidence of Al-Harethi's continued involvement, although it is not entirely clear to whom.

Roth's reading seems a much more plausible interpretation of the Protocol than Stein's and Amnesty's, but it may still be argued that the exception that Roth raises to terrorists' presumed continuing combat status requires further elaboration, for dissociating themselves from terrorist organizations does not necessarily entail abandoning armed struggle. Terrorist organizations, after all, are notorious for splitting apart, but continuing to terrorize (the fragmentation of the Popular Front for the Liberation of Palestine (PFLP) is perhaps the most infamous case in point). New terrorist groups are continually appearing and by the time that they, or newly unaffiliated individuals reveal themselves unambiguously to still be active terrorists, it is too late for their victims. Roth's point then that a terrorist may cease to practice is valid, but is inadequately operationalized in what could be called his 'rule of group withdrawal'. Indeed, the interpretive complexity

of determining when a terrorist ceases to be reasonably regarded as such suggests that the rote application of rules is bound to fail. It might be compellingly argued then that this determination is best made by a competent, independent authority in light of the known facts of individual cases.

Roth's point, however, clearly undermines the position of Amnesty, Stein and the Rapporteur that targeting terrorists systematically violates the human right to life. At least some terrorists, he allows, remain combatants even when not literally in the act of slaughtering civilians. Their argument does, however, usefully draw attention to the central importance of the determination of combat status for the legitimacy of targeting terrorists, and (unintentionally) to the fact that there is no single uncontroversial standard for such determination. These insights point to the need for some kind of legitimate judicial determination of combat status before targeting terrorists, but they do not preclude targeting itself.

II.ii. Is Targeting Terrorists a War Crime?

Accepting that the targeting of terrorists engages humanitarian law, there remains a forceful argument that under that law it constitutes a war crime. This case has recently been advanced by Demian Casey. Casey focuses the killing of Salah Shehadeh, then the head of the Hamas' West Bank military wing. The strength of Casey's analysis emanates not from the effects on the terrorists themselves, but from the unintended but foreseeable collateral impact on civilians.

On July 23, 2002, following a series of bloody terrorist attacks claimed by Hamas under Shehadeh's leadership, an Israeli F-16 fighter-jet launched a missile into Shehadeh`s apartment, bringing down the entire three-story building as well as several adjacent buildings. Fourteen civilians were killed, including children. An Israeli inquiry later found that 'the procedures followed by the IDF operation were correct and professional, as were the operational assessments.' The IDF noted, moreover, that the targeting had been previously put off eight times due to danger to civilians and that if intelligence had indicated the presence of civilians, 'the timing or method of the operation would have been changed.' (Meyerstein 2002) Casey, however, notes that the IDF was at least aware of the presence of Shehadeh's wife, Leila Safira, at the residence, and did not reschedule the attack. (Casey 2005: 338) It may be added that given the timing and locale of the attack, and the ordinance used, that the IDF should have had reasonable foresight of other civilian casualties. Casey notes moreover that civilians have constituted between 30 and 35% of casualties connected with Israeli targetings. (Casey 2005: 316)

Casey assesses the legitimacy of the attack in the light of three distinct war crimes specified in the 1998 Statute of Rome, the legal mandate of the International Criminal Court (ICC) - (i.) willful killing (of civilians), (ii.) attacking civilians, and (iii.) excessive intentional death, injury or damage. The criteria for establishing each crime are essentially that the perpetrator launched the attack, that the attack caused the proscribed result, and that the perpetrator knew that the attack would cause the proscribed result. Casey concludes that in the case of the attack on Shehadeh, all three of the required criteria are met, and therefore the action constitutes a war crime.

Of course, a defense against Casey's charge could be mounted, particularly concerning the third criterion. It is notoriously difficult to establish what planners knew, and in fact those who authorized the attack specifically denied the relevant knowledge. But the presence of Shehadeh's wife, along with the high civilian mortality rate of attacks, undermines this defense. A defense might also be offered in terms of the principles of necessity and proportionality that anchor humanitarian law: in essence, the action was necessary to victory in the war on terror and the unintended effects were proportional to the importance of the objective. The force of such a defense is unclear. Several commentators, for example, draw attention to the characteristic weakness of arguments for the importance of eliminating specific terrorist leaders. For one thing, they may be replaceable with someone worse. Moreover, they rarely participate in attacks themselves, and therefore their elimination may not reduce activity on the ground. Indeed, their elimination may inspire more attacks in the short run. (Richelson 2002: 251-3) Yet even if there can be no assurance that a given targeting will prove decisive in winning a war on terror, it may still be argued that the policy as a whole contributes importantly to the pursuit of a just and stable peace. Still, it has become far more difficult in light of the Statute of Rome war crime criteria to justify posing a serious danger to civilians as proportional to the importance of the military objective.

Casey's argument carries a good deal of force, although is important to note that his argument is directed not to the targeting of terrorists per se, but to failures of implementation. The Israelis, however, seem to have learned a lesson from the attack on Shehadeh and have succeeded in significantly reducing the proportion of civilian casualties produced by their policy after October 2005 (35 targets killed in 12 operations with a total of only five non-target casualties (B'tselem 2006)). Nonetheless, Casey's argument does succeed in establishing the need for the oversight of policy implementation to safeguard civilian lives.

In summary then, the legal case against targeting terrorists fails in principle, but succeeds in demonstrating the illegality of some specific targetings. The critiques therefore draw salutary attention to the need for tighter regulation to ensure that targetings are carried out in compliance with legal standards. In particular, the critiques highlight the importance of a fair and authoritative determination of the combat status of targets, and the importance of independent oversight to ensure civilians safety. Still, even if the targeting of terrorists is in principle legal, critics continue to argue that the policy remains profoundly immoral. Their arguments are examined in the following section.

III. Is it Moral to Target Terrorists?

The problem of the collateral killing of civilians has already been raised as a legal issue, but even granting the legality of some unforeseen fatalities, the charge of immorality remains. In outlining an answer to this credible charge, defenders of the policy observe that not all targetings result in civilian casualties, nor is it an intended or necessary component of the policy (although the sheer possibility can never be entirely eliminated). The charge then mainly concerns a subset of dangerous cases which could be reconsidered without abrogating the entire policy.

A variety of responses have been offered to the charge of causing civilian casualties which can be organized into four types: first, the terrorists started it. Specifically, terrorists initiated at least the armed phase of conflict with attacks on civilians. States, obligated to protect citizens, had little choice but to accept the condition of armed combat. In situations of armed conflict, civilians sometimes die. But the final responsibility for these deaths lies with the terrorists who resorted to systematic violence (against civilians). (IMFA 2003)

Second, it is the terrorists themselves who seek safety by hiding among civilians. This action compounds their initial crime, for it amounts to the illegal use of civilians (many unwilling) as shields against justice. It is thus again the terrorists themselves who bear direct responsibility for civilian deaths. (IMFA 2003; Statman 2004: 186)

Third, the civilian deaths caused by targeting are, in contrast to the crimes of terrorists, unintended. Indeed, extensive safeguards exist to avoid or at least minimize civilian casualties. Moreover, in-so-far as the purpose of stopping terror attacks is a desirable one (to save civilians), and there is sometimes no means to achieve this goal apart from endangering other civilians, the policy may still be justified in consequential terms. (David 2002: 17)

Finally, abstracting from the need to prevent specific attacks to the need to suppress terrorism more generally, it may be compellingly argued that despite some collateral damage, the policy of targeting terrorists is more humane to civilians in general than other, less direct responses - such as re-occupation or massive arrests, detentions and interrogations - which also result in civilian deaths and are frequently perceived as collective punishment. (David 2003: 123-4; Statman 2004: 187) Drawing on these arguments, the IMFA ends its commentary on the justifiability of 'targeting operations' with the following conclusion: 'In the final analysis, responsibility for all the casualties lies with the Palestinian leadership, which has initiated the violence and refuses to bring it to an end. Were Palestinian violence and terrorism to end, Israel would have no reason to take preventive countermeasures.' (IMFA 2003)

These arguments carry a great deal of force, and leave little doubt that terrorists themselves must bear some of the responsibility for the loss of civilian lives. Yet as strong as the points are, they are insufficient to sustain the IMFA's sweeping conclusion that the terrorists bear sole responsibility. It may be that targetings greatly contribute to the effectiveness of the war on terror and may even be necessary to victory (although the point is hotly disputed as will be examined below), but it is implausible to argue that they are strictly necessary to survival, and that such necessity eliminates moral choice and thus washes the hands clean of those who authorize and carry out such measures. There is no credible evidence that other means (including strengthened homeland security, or the construction of security barriers) may not be sufficient to at least mitigate terror. There is also no credible evidence that states face a genuine danger of collapse even if the terrible toll of terrorist atrocities were to continue unabated. Michael Ignatieff in his *The Lesser Evil*, for example, provides a brief but useful overview of sustained terrorist campaigns

against liberal democracies. He convincingly concludes that 'terrorism has never succeeded in breaking apart a liberal democracy,' although he cautions that 'all democracies have been damaged by it.' (Ignatieff 2004: 66-76, 80) No doubt the character of life in Israel and America has already been damaged, but that does not make terror a threat to their very survival. The decision to try to preserve a form of life - a quality of community - at the cost of innocent lives abroad remains, unavoidably, a choice, and one that carries responsibility even if that responsibility is shared. None of this is to say the choice to target terrorists is unjustified, but only that to deny an element of moral choice in this policy is to engage in self-deception.

Moreover, terrorists can turn such attempts to deflect responsibility to their own purposes. Terrorists, of course, typically protest that their own decisions to adopt a violent course were compelled by terrorizing states. They are always reluctant killers, adopting the only strategy available to them. (Post et al. 2003: 175-9, 181-3) Thus they turn the advocate's argument to the opposite purpose. Moreover, they may observe that it is hypocritical of advocates of targeting to minimize the significance of killing civilians in the course of targeting when it is precisely their outrage over the killing of their own civilians, and their anxiety to protect them against such acts, that motivates the targeting itself. Terrorists can also turn around any argument concerning the proportional justification of harming civilians in terms of war objectives (including community survival) to justify their own actions: their targeting of civilians is justified by the imperatives of their own struggle, the survival of their own community.

It is certainly fair of defenders of targeting to suggest that the terrorists themselves must bear some of the responsibility for the lost lives of civilians they hide behind. But the potential responses to this deflection of responsibility are sufficient to show that it can never be completely successful - those who target terrorists must carry at least some of the responsibility for the civilian lives they take, even inadvertently. As Walzer aptly remarks, 'the destruction of the innocent, whatever its purpose, is a kind of blasphemy against our deepest moral commitments. (This is true even in a supreme emergency, when we cannot do anything else.)' (Walzer 2000: 262) The pertinent question then becomes how much moral culpability a society will bear in order to ensure its security. Of course, this is not a judgment that outsiders are in a position to make on behalf of that community, but they can at least point to the enormous moral cost of harming civilians, and the crucial importance of minimizing such costs, if for nothing else for the sustainability of the policy itself.

A useful example of the potential harm inherent in diminishing state responsibility for preserving noncombatant lives is suggested in a pair of articles recently published by Asa Kasher and Amos Yadlin in which they argue that 'under certain conditions, it is morally justified to perform an act of targeted prevention of terror… even if collateral damage is expected' – that is, even if it is known that (foreign) civilians will be killed. (Kasher and Yadlin 2005: 19; 2005b) Their reason for this is that they believe a state's 'prime duty' is the 'the defense of [its own] citizens against terror' (including its soldiers) and that if a state is compelled to fight terror beyond its borders to protect its citizens, it 'does not have to shoulder responsibility for the fact that persons who are involved in terror operate

in the vicinity of persons who are not' and thereby endanger those noncombatants (Yadlin 2005: 8 and 18) The implication is that state counter-terrorist forces are justified in deliberately killing foreign noncombatants if they have reason to believe that such action contributes critically to the protection of at least one co-national combatant.

The Kasher/Yadlin position provokes a host of potential objections, both moral and practical. For present purposes, however, one stands out: the knowing and deliberate choice to kill a noncombatant, particularly when alternatives (with lower body counts) are available, cannot plausibly be said to be (as they seem to suggest) without 'intention'. Yet it is, according to the widely-accepted definition of terrorism adopted and defended here, the intention to do serious harm to noncombatants that primarily characterizes the terrorist. In short then, the action Kasher and Yadlin defend is indistinguishable, at least for many, from terrorism, and therefore threatens to destabilize the distinction between counterterrorism and terrorism, discrediting the former and contributing to the defense of the latter. This result aptly illustrates the danger of too deep a discounting of state responsibility for all noncombatants.

III.i. Is Targeting Terrorists Immoral by Association?

A second charge of the immorality of targeting terrorists concerns the supporting policies required to practice it, and in particular to the collection of intelligence. In relation to Israeli practice, the argument characteristically focuses on the use of spies, informants and treachery to gather the information necessary to identify imminent threats and to target terrorists before they act. In the American case, this immorality is connected with the accumulation of evidence by means of torture and rendition of foreign combatants. The thrust of the argument is that in-so-far as the targeting of terrorists requires other immoral practices, such as coercing informants or torturing detainees, it becomes itself immoral by association.

While the basic charge is the same in the American and Israeli cases, the associated practices are distinct and so warrant separate treatment. In the Israeli case, targeting advocates may wonder why critics object - neither spying itself, nor the use of informants, seem either immoral or unusual. What concerns critics, however, is not the immorality of gathering intelligence itself, but the consequences for Palestinian society. The Palestinians summarily execute suspected spies and collaborators, including no doubt some who are innocent - B'tselem has recorded 113 executions of alleged collaborators since September 2000 (B'tselem 2006). In addition to being unjust and immoral, such executions feed fear, violence and social instability in Palestinian society.

No doubt they do. If, however, the moral fault derives primarily from summary executions by Palestinians then it is a stretch to blame the Israeli policy of targeting terrorists, even if it can be loosely connected as a facilitating condition. Targeting in no way requires Palestinian authorities to forego due legal process. Responsibility lies primarily with those who choose to circumvent justice. Furthermore, merely having spies or informants does not seem to make Israel responsible for conditions under the Palestinian Authority any more than it made the United States responsible for life in the Soviet Union or vice versa. Critics, however, try to reinforce this linkage by stressing that

the Israelis sometimes coerce cooperation by threatening Palestinians' families or property. (Stein 2003: 127; Gross 2003: 358-9) No evidence, however, of any such systematic policy is adduced. Moreover, if the moral fault lies with such cases of coerced intelligence, then it seems possible to answer that these acts are terribly wrong and should be punished and prevented from recurring without thereby repudiating the targeting policy. The critics do, however, effectively raise the importance of continuous oversight of evidence-gathering in support of targeting.

The American case of moral tainting by association with torture is more straightforward. Torture is morally abhorrent and absolutely prohibited in customary international law, just as cruel and unusual punishment is prohibited in the American Constitution. If torture were required for an effective targeting policy, then the policy would clearly be morally tainted by association. The idea of torture's necessity, however, seems to be undermined by the example of the Israelis, who are more rigorously prohibited by their supreme court from employing even moderate forms of physical pressure in interrogation, and yet manage to run a far more extensive policy of targeting terrorists. While there can be no doubt that American interrogations of detainees have sometimes involved torture, the evidence of a necessary relationship between torture and the American targeting policy has yet to be established, and probably cannot be established, until intelligence is gathered, as it should be, without recourse to torture. But if the moral problem is with torture, then that is where it urgently needs to be addressed. With that accomplished, it will rapidly become clear whether sufficient intelligence can still be gathered to support targeting. In the meantime, however, there can be no compelling case for rejecting targeting by association. What the claim and resulting discussion do, however, is to reaffirm again the importance of effective independent oversight in order to assure that the information employed has been gathered in consistence with moral norms.

III.ii. Is Targeting Terrorists a Slippery Moral Slope?

One final argument that is frequently advanced against targeting terrorists is the 'slippery slope' - even if targeting is not immoral at the moment, it may evolve in immoral directions. (Stein 2001: 11; Gross 2003: 360) This type of argument is not, however, very reputable because it lacks clear logical continuity between its premises and conclusions. It relies rather on a purported historical tendency, in this case the historical tendency of covert, intelligence-based operations to escape regulatory control - as illustrated for example in the Church Committee findings regarding the CIA's practice of assassination in the 1950s and 60s.

Advocates of targeting have rarely bothered to respond to this argument. They could, however, plausibly argue that the slippery slope does not work so much against targeting terrorists itself, as against carrying it out in secret without adequate oversight. But this is only partially the case with the Israeli and American policies. While the Israelis are more forthright in avowing their policy (Judge Advocate General Menachem Finklestein actually spelled out the conditions under which targeting is permissible in February 2002), the U.S. administration has also unofficially acknowledged the CIA's targetings. The U.S. Administration doubtless could and should be more open about their policy, but there is no bar to such clarity. Moreover, both Israeli and American policies are subject to

judicial review. Indeed, the Israeli high court has already entertained (and ultimately rejected) petitions against the practice (in HCJ 5872/01). A forceful case can certainly be made for closer judicial oversight, but this case in no way discredits targeting in principle.

While the moral critiques of targeting terrorists then look unconvincing, it is worthwhile noting that the defenses of the policy largely concede the importance of openness of practice and independent oversight. The possibility remains, however, that the targeting of terrorists can be discredited as an ineffective policy.

IV. Is the Targeting of Terrorists Effective?

The idea that targeting terrorists perpetuates and even intensifies a cycle of violence is certainly a popular refrain among its critics - particularly in relation to Israeli policy. (Amnesty 2001: 1; Gross 2003: 357; Stein 2003: 133) Moreover, the impression of aggravation is reinforced by the terrorists themselves, who often justify their own attacks as retaliation for targetings. Some advocates of targeting, such as Steven David, acknowledge that 'a much stronger case can be made that targeted killing actually increases the number of Israelis killed, by provoking retaliation, than it saves by eliminating key terrorists.' (David 2002: 9) He points to several cases where targeting of senior terrorist figures, such as Yehiya Ayash, Mustafa Zibri and Raed al-Karmi, were followed by intensified terrorist action (and Israeli response). Three cautions, however, are appropriate here: first, whether attacks are specifically retaliatory or would have been carried out anyway is difficult to determine as terrorists have an incentive to claim retaliation to reinforce their self-justification and to deter future targetings; second, it is impossible to assess the number of attacks which otherwise would have occurred but were prevented by the elimination of terrorists (Ayash alone, for example, is credited with a hand in over 150 Israeli fatalities and nearly 500 injuries in the three years before his abrupt death (Katz 1999: ix)); and third, it is impossible to assess the general reduction in attacks due to keeping terrorist targets on the run and deterring participation by others who fear to be targeted.

Still, David accepts that the tangible evidence at least suggests a tendency for intensified retaliation following targetings, particularly of senior terrorist operatives, and especially where these result in civilian deaths. For this reason, among others, Israel in recent years has concentrated its attacks on 'mid-level fighters, important enough to disrupt a terrorist cell but not so important as to provoke murderous retaliation.' (David 2002: 5) Still, David acknowledges that the Israeli policy has shown little evidence of reducing violence in the short or medium run.

Nonetheless, David advances two interesting arguments for continuing the practice. First, it does show evidence of impacting on terrorist capacities in the long-term - as evidenced, for example, in the reduced lethalness of attacks and the increased number of failures. He also points to the priority terrorist groups place on stopping targeting when negotiating with Israel as evidence of its impact. A second argument is that despite the increases in violence, the policy remains popular among Israelis who seem to be willing to absorb increased casualties in order to assure that terrorists are punished. (David 2002: 16-21;

2003: 122-6) The plausible implication of this second argument is that it is mistaken to think that the sole purpose of targeting is to reduce the number of terrorist attacks. Punishing terrorists who are otherwise beyond the reach of the law is also important, and there is little reason to doubt that targeting succeeds on that measure. Moreover, as already noted, there is a strong case to be made that it succeeds in relatively discriminating fashion (compared to other counter-terrorist strategies). In sum then, while there are serious reasons to doubt that targeting actually reduces the number of terrorist attacks in the short run, there are not yet decisive reasons to conclude that the policy is ineffective. However, David's focus on domestic approval of the policy leaves open the question of international reaction and its ramifications.

IV.i. Does targeting terrorists lead to international condemnation and isolation?

In assessing the broader implications of targeting terrorists for a state's international relations, critics can certainly point to strong condemnations by the UN and human rights organizations like Amnesty. They also can point to an enormous backlog of diplomatic statements condemning the practice and some strong opposition at home. But the relevant charge here is not the anodyne one that some states, organizations and people criticize this policy. It hardly seems likely that U.S. or Israeli policy would cease to be widely criticized if they foreswore targeting terrorists. The relevant charge here is that they will suffer in their relations with other states if they continue. Of this stronger claim, there is scant evidence.

Apart from limited relations with Jordan, Egypt and Turkey, Israel is isolated in the middle-east, but this position has nothing to do with targeting terrorists, nor is it likely to change should Israel desist. The United States, by contrast, is widely considered the sole superpower and exercises wide influence. The last four years have seen friction with some of its European allies, but this has been occasioned primarily by its intervention in Iraq and its practices of detention and torture. By comparison, the issue of targeting terrorists has received limited attention.

The fact of the matter is that September 11th, reinforced by later mass attacks by al-Qaeda and other groups, significantly hardened international attitudes to terrorism. In particular, it provided a compelling rationale for the American adoption of a targeting policy - a move made with less condemnation by powerful countries than might have been expected. In this way, the mainstream of international politics shifted significantly in the direction of tolerating targeting. It is unsurprising then to see that both the number and intensity of criticisms of Israeli targeting have decreased significantly - with the exception of operations that are either directed against an especially problematic target (like Sheikh Yassin) or which result in numerous civilian casualties. Indeed, criticism of Israel in recent months has been further muted by its unilateral withdrawal from Gaza. The political upshot is that that the diplomatic price that countries like Israel and the United States appear likely to pay for pursuing a targeting policy will be, at least for the moment, tolerable.

Of course, the UN Rapporteur and groups like Amnesty remain deeply opposed to targeting terrorists. But it is not clear what they can do, beyond a continued campaign to

mobilize the public, particularly since the United States and Israel are not participants in the ICC and no unfavorable resolution is likely to be passed by the Security Council.

In summary then, the policy of targeting terrorists appears to be defensible in principle in terms of legality, morality, and effectiveness. On the other hand, some specific targetings also plausibly seem indefensible in these terms, or at least deeply problematic. This situation seems to leave critics and advocates of the policy in a highly unsatisfactory stalemate. Critics condemn the practice of targeting terrorists without being able to do anything to actually stop governments from doing it. On the other hand, the governments have been unable to establish the legality of their practice in international forums and by consequence appear to lend credibility to terrorists by seemingly mirroring the illegality and immorality of their practices. The result is on the one hand something of a rogue policy being pursued without clear constraint or regulation, and on the other hand the undermining of the authority of international law. Although the current situation is clearly detrimental to the war on terror and to the integrity of the international political system, neither advocates nor critics of the policy appear to have a viable strategy for resolving the impasse. A final issue which urgently demands attention then is whether there are any plausible bases for a coherent political compromise over the issue of targeting terrorists.

V. Conclusion: the Possibility for Principled Compromise

In this final section I will make a brief case that there is room for a principled compromise between critics and advocates of terrorist ta. My argument will be by example – a short illustration of one promising possibility. It will not satisfy everyone, but I will suggest that it has the potential to resolve the most compelling concerns on both sides.

The most telling issues raised by critics of targeting fall into three broad categories: (1.) the imperative need to establish that targets are combatants; (2.) the need in attacking combatants to respect the established laws of war; and (3.) the overwhelming imperative to avoid civilian casualties. The first issue seems to involve an authoritative judicial determination that could only be answered by a competent court. The second issue requires the openly avowed and consistent implementation of targeting according to standards accepted in international law - a requirement whose fulfillment would best be assured through judicial oversight. The third issue calls for independent evaluation of operations to assure that standards of civilian protection are robustly upheld, a role that could be effectively performed by a court.

The first issue then must, and the second and third can, be resolved by the introduction of credible judicial oversight. But what kind of court could be expected to maintain secrecy around sensitive intelligence and yet render authoritative determinations as to, for example, individuals' combat status? An independent international court would no doubt be ideal, but even apart from all the technical and administrative difficulties such a solution would entail and the secrecy concerns it would evoke, it seems clear that the United States and Israel would refuse to have their national security subject to the authority of a foreign body, however judicious. They would plausibly argue, as indeed

they have in regards to the ICC, that the final authority in this supremely important domain must derive ultimately from the will of their own people, whose lives and community are at stake. On the other hand, critics of targeting would certainly demand an independent, competent and internationally credible body. All the more so since the court's proceedings, for obvious reasons, could not be open to public scrutiny.

On this difficult question Michael Ignatieff offers a helpful idea. At the end of a discussion of a number of troubling legal issues raised by the war on terror, he suggests the possibility of setting up national courts loosely based on the model on the Foreign Intelligence Surveillance Court (FISC), which considers surveillance and physical search orders from the Department of Justice and US intelligence agencies related to foreign intelligence operations. (Ignatieff 2004: 134) Developing Ignatieff's suggestion, I propose a Federal Counterterrorism Oversight Court (FCOC).

The institutional features of the FCOC could be designed to assure credibility and independence on one side, and secure and efficient contribution to national policy on the other. For example, like the FISC, the FCOC could be composed of seven federal court judges selected by the Chief Justice of the Supreme Court and serving staggered seven years terms. Like the FISC, the FCOC could hold its proceedings *in camera*, ensuring the secrecy of sensitive intelligence information. The FCOC could then consider requests from military and intelligence organizations to designate suspected terrorists as enemy combatants, assessing whether the intelligence presented was credible and damning enough to warrant such a designation. It could also be assigned the responsibility to automatically review any actions that resulted in civilian casualties, and be given the power to publicly censure operations and government organizations which failed to adequately protect civilians, as well as to suspend, or even to terminate, targeting operations. Finally, it could also be authorized to review charges brought by other governments or private persons that targeting operations permitted by its decisions violated the laws of war, in particular, by engaging in perfidy or employing unnecessary or disproportionate force.

In at least three key respects, however, the design of the FCOC should differ from the model of the FISC. As the FISC is charged with assessing surveillance requests from government agencies, its writs and rulings remain permanently sealed from civilian review. But in the interests of resolving the second issue of openness, the *findings* of the FCOC should be made public, including the names of those judged to be combatants, as well as any reprimand from the court regarding targeting operations.

In the second place, the FISC foregoes adversarial legal proceedings because potential subjects of surveillance can obviously not participate. It has been much criticized on this count. The FCOC should not follow this precedent, which, in the views of many legal theorists and philosophers flies in the face of the core of the Western legal tradition grounded on the adversarial contention of opposed views. Evidently, the trials of terrorists who cannot otherwise be brought to justice will be trials *in absentia*. This does not, however, necessitate the abandonment of adversarial procedure. In addition to the seven judges appointed to the court, an independent counsel should be appointed by the

President of the National Bar Association to represent the interests of the accused before the court. Evidently, appropriate precautions will need to be taken to ensure the secrecy of court proceedings. But the independent counsel should also not be barred from offering general assessments of the performance of the court. Obviously this is an imperfect resolution to an intractable problem, but it should contribute significantly to ensuring the fairness of the FCOC.

Finally, the FCOC must be distinguished from the FISC in a third crucial sense. The recent 'domestic surveillance' scandal in the United States involving the Executive Branch's circumvention of the FISC approval process suggests safeguards would need to be built into the FCOC mandate. In the case of the FISC, President Bush issued an Executive Order which authorized the National Security Agency to carry out surveillance of any Americans suspected of links with al-Qaeda without FISC approval. (Risen and Lichtblau 2005, A1) The scandal and legal consequences that ensued for the administration once this information became public in 2005 have significantly reduced the likelihood of a similar course being taken in the future. Nonetheless, the possibility should be explicitly precluded by specifying in the enabling legislation that no targeting action can be considered legally authorized without approval of the court. In response to the argument that immediate action may sometimes be required in emergency situations, the presiding justice could be permitted to issue a provisional approval based on *prima facie* evidence, but only subject to full subsequent review by the court.

Some critics and advocates of targeting will no doubt be dissatisfied with this resolution. Critics will worry that the FCOC would essentially be a rubber stamp (while robbing them of their best rhetorical point – that targetings are extra-judicial). But there is no compelling reason to believe that courts, especially high-level federal courts, must always approve government policies. After all, supreme courts in both Israel and the United States have both recently issued sharp rebukes of government counter-terrorist policies (e.g., 03-333/4 on the U.S. legal status of detainees, and 3799/02 on the IDF use of human shields).

On the other hand, some advocates will certainly worry that a requirement of FCOC approval will hinder the efficiency of targeting and that publishing lists of targets will render them more difficult to find. On the former point, however, there is little evidence that the incorporation of reasonable judicial procedures, such as those of the FISC, need render related policy ineffective. After all, as the 9-11 commission has pointed, the intelligence community succeeded in gathering the data necessary to anticipate the September 11th attack. (9-11 Commission 2004: 254-77) The failure was in the domains of analysis and response. What is evident, however, is that carrying out extensive and dangerous counter-terrorist programs without judicial oversight generates widespread public skepticism and opposition (which tends to undermine the effectiveness of the programs) and to enormous legal difficulties in the long run – as exemplified by the American torture/rendition program.

On the second point, while it is true that targets may 'go to ground' if tipped off, the fact is that all or virtually all potential targets are already on most wanted lists (often with

hefty price tags connected to information leading to them). In essence, they have already gone to ground – that is in part why targeting is required in the first place. Moreover, a retreat into even deeper obscurity is likely to further seriously disrupt their ability to organize and carry out attacks. Finally, the Israeli experience suggests that targets will break cover eventually, and a little patience seems like a small price to pay for ensuring the justice of state-administered killing.

These answers will probably fully satisfy neither all critics nor all advocates. But the burden of this section has been only to show that compromises are possible that address their most legitimate concerns. I think that the suggestion of an FCOC shows that a plausible and principled compromise is possible. In this light, the pertinent question becomes not whether terrorist targeting as currently practiced is uniformly legal, moral and practical or the reverse, but how institutions can best be designed to assure that terrorist targetings carried out in the future are uniformly legitimate and effective.

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